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### Children's Equality: Strategizing a New Deal for Children

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# RESPONSE: CHILDREN’S EQUALITY: STRATEGIZING A NEW DEAL FOR CHILDREN

*Nancy E. Dowd\**

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## INTRODUCTION

It is the ultimate gift to have one’s work trigger feedback, critique and challenge that expands and deepens the project. Professors Cooper, Huntington, McGinley, Silbaugh, and Woodhouse all have been sources of inspiration for me; their Articles and Essays gathered here in response to *Reimagining Equality* contribute both to my thinking and to the core focus of the book, the well-being, development and equality of all children, but also to the broad focus of this special issue on children and poverty. I am particularly grateful for their challenges and critiques, and their shared focus on the strategies I explore in the book, including statutory, constitutional, and legislative approaches.

Their focus on *strategies* for reimagining equality and achieving a New Deal for Children suggests the following. First, a critical framework to add to the arguments for developmental equality, which

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\* Professor and David Levin Chair in Family Law, University of Florida Levin College of Law. I am grateful for this opportunity to respond to these Articles and Essays, and thank the editors of the *Fordham Urban Law Journal* for their work and dedication.

incorporates specific examples of implementation of children's rights, is the framework of human rights. This framework provides precise answers to the questions and concerns I have raised about the challenges of implementing a New Deal.<sup>1</sup> Second, there are additional arguments for the claim that the Constitution guarantees positive rights: children's developmental equality rights are essential to citizenship and particularly to the informed exercise of the franchise. This further strengthens a constitutional strategy for children's equality, whether in litigation or as a basis for legislation.<sup>2</sup> Third, the commentary suggests that the usefulness of a statutory strategy under existing disability statutes bears rethinking.<sup>3</sup> Returning to a disability strategy raises two issues: first, whether race and racial trauma or racial stress should be thought of as disability or analogized to disability; and second, whether the scope of the statutory definition of disability can include a shift from individuals to groups or cohorts, enabling class-based claims that focus on structural change or remedy. Finally, the commentary raises the hard question of what is politically feasible and practicable in the contemporary context to achieve movement toward a New Deal for Children.<sup>4</sup> Specifically, what does the broad support for universal prekindergarten teach regarding the potential for a broad New Deal or what might be gained through an incremental strategy? These conceptual and practical elaborations and challenges present difficult but important questions. In this response, I explore each of these themes that complicate, in the best, most productive and welcome of ways, what I have proposed.

#### I. ADDING A HUMAN RIGHTS FRAMEWORK: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The Articles and Essays are provocative and challenging, adding and expanding to the framework of *Reimagining Equality*.<sup>5</sup> Barbara Bennett Woodhouse in particular advocates using the framework of human rights, specifically the Convention on the Rights of the Child

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1. NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 136–66 (2018); see also Barbara Bennett Woodhouse, *Reimagining Equality Through the Lens of Human Rights: Lessons from the United Nations Convention on the Rights of the Child*, 47 FORDHAM URB. L.J. 353 (2020).

2. Katherine Silbaugh, *Developmental Justice and the Voting Age*, 47 FORDHAM URB. L.J. 253, 289–90 (2020).

3. Ann C. McGinley & Frank Rudy Cooper, *Dis/ability, Racial Stress, and Intersectional Cohorts*, 47 FORDHAM URB. L.J. 293, 295–96 (2020).

4. See generally Claire Huntington, *Lessons from the Prekindergarten Movement*, 47 FORDHAM URB. L.J. 343 (2020).

5. DOWD, *supra* note 1.

(CRC),<sup>6</sup> as a valuable perspective not only to enrich the arguments for developmental equality, but to answer the concerns that I raise about implementing a New Deal for Children at the end of the introductory Essay in this special issue.<sup>7</sup> I articulated five concerns: First, how to sustain the focus on identities, particularly racial identities, that mark current hierarchies among children.<sup>8</sup> I worry that policies that provide universal benefits or supports might subordinate disfavored identities and perpetuate inequality. Second, if developmental equality was embraced as a goal, how could the strength of that concept, essential to children's equality, be sustained as opposed to being co-opted, domesticated or weakened.<sup>9</sup> Third, how could maximum support to children based on their needs and achieving their full capacity be supported, as opposed to modifying that goal to either an average or minimal level of support for all children?<sup>10</sup> Fourth, is there a danger to a comprehensive program of support that involves significant government action; will the state be intrusive instead of responsive?<sup>11</sup> Finally, supporting children to ensure their equality rejects the notion of the privatization of responsibility. Given our attachment to family privacy and the corollary, to explaining children's hierarchies by blaming their parents rather than the state, how can we shift the paradigm to embrace the notion that all children are our children, that there is collective, social responsibility for the equality of children?<sup>12</sup>

Professor Woodhouse argues that a children's human rights perspective provides answers to those critical questions, and among her responses the most important point, in my view, is her argument about the value of universalism.<sup>13</sup> Woodhouse reconfigures and describes universalism in a different way from my concern that universalism understood as neutrality can hide normative choices that lead to reinstating the dominance of favored children. Instead she "explore[s] universality as an *opportunity* rather than a threat and describe[s] the role of the human rights principles of indivisibility and interdependence of rights in mitigating the dangers of

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6. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

7. Nancy E. Dowd, *Children's Equality: The Centrality of Race, Gender and Class*, 47 FORDHAM URB. L.J. 231 (2020) [hereinafter Dowd, *Children's Equality*]; see also generally Woodhouse, *supra* note 1.

8. Dowd, *supra* note 7, at 248–49.

9. *Id.* at 249.

10. *Id.* at 249–50.

11. *Id.* at 250–51.

12. *Id.* at 251.

13. Woodhouse, *supra* note 1, at 356–57.

universalizing.”<sup>14</sup> The principles of interdependency and indivisibility, in other words, prevent compartmentalizing or ignoring identities.

Woodhouse thus argues that universalism should *enhance* the specific, not bury it, because of the interdependency and indivisibility of identities in the exercise of rights — rights that are themselves interdependent, indivisible, equal.<sup>15</sup> The array of rights protected by the CRC is conceptualized as interconnected rather than separate; she contrasts this to U.S. conceptions of rights in isolated categories.<sup>16</sup> Therefore, under U.S. law, for example, race and gender are subject to separate analysis and different constitutional standards, making it more difficult to articulate the reality of discrimination against Black boys.<sup>17</sup> Moreover, there is no exacting scrutiny of class whatsoever, making challenges that involve poverty alone toothless, and ignoring, again, the role of class in the analysis of state structures as they affect the lives of low-income Black boys.<sup>18</sup> In contrast, Woodhouse argues that all aspects of identity are honored by the CRC, alone and in combination, in the exercise of rights.<sup>19</sup> Those rights are themselves viewed not as isolated but as interconnected, subject both to protection and, more significantly, to affirmative support for their exercise.<sup>20</sup> This links equality and non-discrimination to affirmative rights, and would support meeting the needs of every child in the full exercise of their rights and the elimination of hierarchies among children by virtue of respect for all aspects of their identity. This broad interconnected array of rights is similar to the interconnected support framework articulated in the New Deal for Children. Woodhouse argues

14. *Id.* at 355 (emphasis added).

15. *Id.* at 357.

16. *Id.* at 357–59.

17. Compare *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying strict scrutiny to racial classifications) *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) *with* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (applying intermediate scrutiny to gender or sex discrimination). The rich literature on intersectionality and multiple identities critiques this problem in U.S. doctrine and its erasure of unique elaborations of subordination. The seminal article articulating this analysis is Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). McGinley and Cooper extend this framework to masculinities analysis. See generally MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH (Ann C. McGinley & Frank Rudy Cooper eds., 2013).

18. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). On the treatment of socioeconomic rights, class, and poverty, see generally Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109 (2009).

19. Woodhouse, *Reimagining Equality Through the Lens of Human Rights*, *supra* note 1, at 357–59.

20. *Id.* at 359–61.

universalism incorporates particularity, requiring that every child have the full support of their rights, which reflects equity principles that require providing for children based on their needs.<sup>21</sup> This would not recreate hierarchies, but instead would prevent them.

I could not agree more, particularly with the powerful argument that in every instance in which *some* children are marginalized there is a violation of universal human rights. Far too often, however, such marginalization of the already subordinated occurs. As examples, one can look to broad policies on health care,<sup>22</sup> social services<sup>23</sup>, and immigration policy,<sup>24</sup> with the common pattern of serving middle- and upper-income children better than lower income children. Or one can

21. *Id.* at 356–57, 260–62.

22. One need not look further than differential rates of problems experienced in pregnancy and during childbirth to find racial disparities. Dowd, *Children's Equality*, *supra* note 7, at 233 n.1, n.2. On health disparities generally, see Elizabeth Brondolo et al., *Race, Racism and Health: Disparities, Mechanisms and Interventions*, 32 J. BEHAV. MED. 1 (2009) (special issue on health disparities); William W. Dressler et al., *Race and Ethnicity in Public Health Research: Models to Explain Health Disparities*, 34 ANN. REV. ANTHROPOL., 231, 231 (2005) (“psychosocial stress model and the structural-constructivist model offer greatest promise to explain disparities”).

23. Child poverty rates in the United States are the best evidence of the lack of a social safety net and the distribution of poverty by race. The U.S. child poverty rate has remained at or above 20% for decades; for African American children, one in three is poor. Arguably the poverty standard does not reflect realities for many children, suggesting that the poverty level is much higher. *Child Poverty*, NAT'L CTR. FOR CHILD. POVERTY, <http://www.nccp.org/topics/childpoverty.html> [https://perma.cc/9ERZ-6NF4] (last visited Jan. 2, 2020) (“About 15 million children in the United States — 21% of all children — live in families with incomes below the federal poverty threshold, a measurement that has been shown to underestimate the needs of families. Research shows that, on average, families need an income of about twice that level to cover basic expenses. Using this standard, 43% of children live in low-income families.”).

24. Horrific U.S. immigration policies that target children at the southern border, children of color, attempting to move from south to north, have been the subject of extensive reporting and litigation. *See, e.g.*, Amit Jain & Joanne Lee, *Interviewing Refugee Children: Theory, Policy, and Practice with Traumatized Asylum Seekers*, 29 YALE J.L. & FEMINISM 421 (2018); Ginger Thompson, *Families Are Still Being Separated at the Border, Months After Zero Tolerance Was Reversed*, PROPUBLICA (Nov. 27, 2018, 4:45 PM), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed> [https://perma.cc/42LW-ZLH9]; *Statement by Center Director Jack P. Shonkoff, M.D. on Separation of Families*, HARV. CTR. ON DEVELOPING CHILD (June 20, 2018) <https://developingchild.harvard.edu/about/press/shonkoff-statement-separating-families/> [https://perma.cc/2Q8W-PZTK]; *All Things Considered: Whistleblowers Warn of Harmful Conditions for Children in Migrant Detention Centers*, NAT'L PUB. RADIO (Dec. 8, 2018), <https://www.npr.org/2018/12/08/674327419/whistleblowers-warn-of-harmful-conditions-for-children-in-migrant-detention-cent> [https://perma.cc/DB5X-XT96]; *see also* Denise-Marie Ordway, *Family Separation: How Does It Affect Children?*, HARV. UNIV.: JOURNALIST'S RESOURCE (June 27, 2018), <https://journalistsresource.org/studies/society/public-health/familyseparation-child-health-research> [https://perma.cc/522K-P7TL].

look at specific provisions, such as current federal parental leave,<sup>25</sup> or proposals for childcare or early childhood education.<sup>26</sup> Crafting policy that works for all, mindful of the fact that children are differently situated, serves principles of equity and dignity for all children and their families. Triggering change not by targeted programs (e.g., not the Head Start Model)<sup>27</sup> but by universal programs that meet children where they are and hew to the principles of developmental equality is the answer. Moreover, change must be sustained by rigorous scrutiny both to accomplish developmental equality and to prevent the return to a structure of inequality. As Professor Huntington notes in her Essay, universalism is popular, drawing far broader support than targeted programs aimed at low-income families, who remain stigmatized and derided as responsible for their circumstances.<sup>28</sup> If universalism is framed as Woodhouse suggests, then it takes advantage of support for universalism, while ensuring all children benefit based on needs and ensuring equal outcomes and opportunities.

I remain convinced that this strong, empowered universalism is possible only if we keep our eye on disfavored identities, the presence of hierarchies, and singular as well as intersectional identities. A human rights framework is a powerful antidote to subordination of any child or group of children. If universalism is to be defended, it is critical that does not mean a merging into a singular, neutral identity, or a goal of assimilation to a preferred norm. Thus, I would argue that perhaps that goal might best achieved by placing the marginalized at the center,

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25. The federal parental leave provision covers only roughly half of the workforce and because it does not provide for pay during leave, it is largely useless to low-income parents or single parents, and these shortcomings disproportionately impact families of color. See GEO. UNIV. L. CTR., FMLA SCOPE, COVERAGE AND ELIGIBILITY, WORKPLACE FLEXIBILITY 2010 (2010), [scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1012&context=regulations](https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1012&context=regulations) [https://perma.cc/52GA-YWZW]; Janice Arellano, *Don't Leave the U.S. Behind: Problems with the Family and Medical Leave Act, and Alternatives to Help the Employee Work-Family Relationship in the 21st Century*, J. WORKPLACE RTS. 1–2 (June 2015). On broad issues of work-family policy, gender and class concerns, see generally JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2008); JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

26. See Dowd, *Children's Equality*, *supra* note 7, at 249 n.71 and accompanying text.

27. Head Start is designed to provide childcare for low-income families, so it is a needs-based model of policy; but it has never been fully funded, and thus provides services only to roughly one-third of the children that qualify. Marianne M. Hillemeier et al., *Quality Disparities in Child Care for At-Risk Children: Comparing Head Start and Non-Head Start Settings*, 17 MATERNAL & CHILD HEALTH J. 180, 180 (2013).

28. Huntington, *supra* note 4, at 349–51.

as the central focus. By that I mean that we explicitly and clearly underscore that the universal human rights of children, by its terms, is anti-hierarchical. That requires dismantling both subordination and privilege. Universalism may serve the particular but will do so only by keeping the particular in view.<sup>29</sup>

Professor Woodhouse also argues that the CRC and human rights thinking provides answers to the other concerns that I have raised. Regarding issues of incrementalism and funding, she notes that under the CRC the state obligation of support for children's rights is robust: they must provide support "to the maximum extent of their available resources."<sup>30</sup> This demands a standard of developmental support to the level necessary to maximize developmental capacity, subject only to resource limitations. The U.S. budget outside of dedicated funding would clearly be adequate to fund a New Deal for Children.<sup>31</sup> Woodhouse points to three decades of experience with the CRC, together with robust models of social welfare states, as providing a wealth of models and policies of a "responsive" state rather than an "intrusive" state.<sup>32</sup> Her particular example, Italy — which she describes and analyzes in her forthcoming book, *How Our Changing World Threatens Children's Rights, The Ecology of Childhood*<sup>33</sup> — is particularly helpful because it comes not from the most generous European state, but rather from one arguably in the middle of

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29. Many organizations dedicated to the universal well-being of children measure the factors that correlate with inequalities among children. See, e.g., *Innocenti Report Card*, UNICEF, <https://www.unicef-irc.org/publications/series/report-card/> [https://perma.cc/DFV3-FDS7] (last visited Dec. 27, 2019). Data is critical to monitoring and action for a comprehensive program (or even a localized or single program) like the New Deal for Children.

30. Convention on the Rights of the Child, *supra* note 6, at Art. 4.

31. According to an analysis of the 2015 federal budget, the budget is divided between mandatory spending, discretionary spending and service of debt. Kimberly Amadeo, *FY 2015 U.S. Federal Budget and Spending*, Balance (June 25, 2019), <https://www.thebalance.com/fy-2015-u-s-federal-budget-and-spending-3306304> [https://perma.cc/NT7U-H2SJ]. Roughly two-thirds of the U.S. budget is spent on mandatory spending, but that leaves a sizable portion of the budget for discretionary spending, which now is used disproportionately on military spending. See *id.* A New Deal for Children might fall within either mandatory spending (like Social Security and Medicare) or discretionary spending. See, e.g., *National Priorities Project*, [www.nationalpriorities.org](http://www.nationalpriorities.org) [https://perma.cc/38NC-J97T] (last visited Dec. 27, 2019). For a breakdown of the 2020 budget, see Christopher Chantrill, *US Federal Spending Pie Chart*, [https://www.usgovernmentspending.com/US\\_fed\\_spending\\_pie\\_chart](https://www.usgovernmentspending.com/US_fed_spending_pie_chart) [https://perma.cc/ZF4Z-75H4] (last visited Dec. 27, 2019).

32. Woodhouse, *supra* note 1, at 354–55, 368–70.

33. BARBARA BENNETT WOODHOUSE, *HOW OUR CHANGING WORLD THREATENS CHILDREN'S RIGHTS: THE ECOLOGY OF CHILDHOOD* (2020) [hereinafter WOODHOUSE, *CHANGING WORLD*].



European models. Based on that work, she reinforces the importance of the local: “advocacy at the regional and grassroots level should not be viewed as a fallback position but as integrally related to the success of Dowd’s New Deal.”<sup>34</sup> She suggests that lessons might be learned from Roosevelt’s New Deal to see how regional and local support happened, as well as looking specifically to the history and evolution of Social Security to assess how this became an embedded program, unimaginable to cut or discard.<sup>35</sup> This adds to the critical perspective I have argued for in recognizing that a comprehensive program like the New Deal has its precursors in the 1930s New Deal as well as the G.I. Bill and Great Society programs.<sup>36</sup> This call to examine local implementation, however, is a welcome addition to focusing exclusively at the national level.<sup>37</sup>

Finally, Professor Woodhouse has long been a critic of the privatization of family.<sup>38</sup> In this Essay as well she suggests important tools to break down the public/private divide: recognizing

34. Woodhouse, *supra* note 1, at 370.

35. *Id.* at 371.

36. DOWD, *supra* note 1, at 97–136 (discussing prior comprehensive legislative schemes along with critique of their lack of inclusion and active discrimination).

37. This examination might be combined with further scrutiny of Roosevelt’s “Second Bill of Rights,” a radical proposal for affirmative rights that was not get implemented, and why that did not happen. President Franklin Delano Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944).

38. See generally BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008).

There is a dark side of *Meyer* and *Pierce*, which promotes a view of the child as the parent’s private property, existing essentially outside the domain of social concern or legitimate state authority. This notion impeded development of early child protective laws, and remains alive in modern cases and controversies about adoption, custody, religion, education, and medical care. In many of these contexts, courts citing *Meyer* and *Pierce* have treated biological parents’ rights as virtually absolute, outweighing children’s basic needs for responsible parenting . . . I have argued that parental rights should be reconceptualized as flowing from parents’ responsibilities, and that parenthood is not a form of ownership but rather of stewardship of children. I have suggested a scheme of children’s “needs-based rights,” conceptualized not as rights of autonomy but as rights to receive basic nurture and protection, not only from their parents but also from their communities, states, and nations. Although child-rearing is rightly entrusted to parents and family members as those who presumptively value, love, and know their children best, I have argued that laws and policies must recognize children as people in their own right. As future citizens, their welfare should be the law’s central concern in allocating adult power over children.

Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 394 (1996); see also Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999).

vulnerabilities and using vulnerabilities theory; employing an ecological approach to understand the scope of what influences the development of children; and using the traditions of transformation in our constitutional history and doctrine to establish children's rights and human rights. Those tools construct her view that privatization in fact violates children's human rights.<sup>39</sup> This leaves us with the challenge of how to change our ways of thinking to embrace the human rights and children's rights model, and the principle that all children are our children. Woodhouse has been among the strongest voices that have consistently been a voice for children's rights, and her forthcoming work continues that powerful advocacy.<sup>40</sup>

## II. STRENGTHENING THE CLAIM FOR CHILDREN'S POSITIVE CONSTITUTIONAL RIGHTS

While Woodhouse adds the framework of human rights, Katharine Silbaugh strengthens the constitutional claims for children.<sup>41</sup> She finds an additional basis for children's *positive* rights within the opposite claim that our Constitution is one of *negative* rights.<sup>42</sup> Silbaugh argues that the view that "the Constitution is one of negative rights" *presumes the existence of positive rights*, especially voting.<sup>43</sup> Voting is a primary positive right, although not the only one, guaranteed by the Constitution. Her analysis lends strength to arguments for positive rights for children.

Silbaugh links the positive right to vote to the positive right for developmental equality by arguing maximizing development supports the full and informed exercise of the franchise.<sup>44</sup> This is underscored by the history of the development of universal public education, and the strong support for education as essential to citizenship.

Even in a government system entirely devoted to negative rights, an argument for a substructure of positive rights that enable the broader negative rights can include both developmental justice and voting itself, and find grounding in early thinking about state-financed schooling . . . [this is the idea of] enabling rights within our system.<sup>45</sup>

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39. Woodhouse, *supra* note 1, at 355, 372–76.

40. *See generally* WOODHOUSE, *CHANGING WORLD*, *supra* note 33.

41. Silbaugh, *supra* note 2.

42. *Id.* at 385–89.

43. *Id.*

44. *Id.* at 281, 289–90.

45. *Id.* at 287.

If support for development is uneven and unequal, it impacts the equal exercise of citizenship rights, the right to vote and each citizen's voice with respect to who designs laws and policies.

Silbaugh links citizenship equality to developmental equality by underscoring the existing links between undermining development, disproportionate concentration of minorities in juvenile justice, over-incarceration in the adult criminal justice system, and adult loss of voting rights for over- or hyper-incarcerated Black males.<sup>46</sup> Additionally, in the course of examining the arguments for lowering the voting age to 16, Silbaugh delves into the developmental scholarship that is so critical to the concept of developmental equality. Here, she makes the case of sufficient developmental capacity to make informed decisions, and points to the evidence that permitting voting at age 16 triggers a higher rate of voting, data that is intriguing and heartening about democratic participation.<sup>47</sup>

Silbaugh's analysis provides further support for the notion of children's positive rights. I have argued in *Reimagining Equality* that the Constitution is not simply a charter of negative rights.<sup>48</sup> Her reassessment of the negative rights argument strengthens the claim for positive rights essential to a New Deal for Children.

### III. RETHINKING THE USE OF THE DISABILITY LENS AS A STATUTORY STRATEGY FOR DEVELOPMENTAL EQUALITY

Professors McGinley and Cooper critically evaluate my dismissal of the disability litigation strategy.<sup>49</sup> Just as Woodhouse questions my sense of universalism, they challenge my critique of the disability structure and my concern that it would reinforce racial stereotypes.<sup>50</sup> McGinley and Cooper argue the concept of disability might be shifted from a medicalized, physical perspective to the notion of disability as a constructed status or identity.<sup>51</sup> If disability is constructed, it can be analogized or compared to race as a cultural construct.<sup>52</sup> As a result, one might see the potential links between disability and race. If this is

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46. *Id.* at 256–57, 262, 282, 289–90. A link could be made as well to other systems that create hierarchies among children, such as education, that undermine equal citizenship.

47. *Id.* at 281–82.

48. For a more detailed analysis of children's constitutional rights, see Nancy E. Dowd, *Children's Equality Rights*, 41 CARDOZO L. REV. (forthcoming 2020).

49. McGinley & Cooper, *supra* note 3.

50. *Id.* at 312–13.

51. *Id.* at 321–24.

52. *Id.*

so, this suggests a potentially more radical version of the Compton litigation and the potential of using an existing statutory framework to dismantle inequality.

They focus on racial stress (plus poverty or class) as disability, creating for a cohort, not just an individual, disability.<sup>53</sup> In addition to considering whether race or racism creates disability, then, they aim to construct an analysis that focuses on how disability, or the potential for disability, is imposed on a group. Using the structural potential of the Adverse Childhood Experiences (ACEs)<sup>54</sup> framework, they call for identifying the experience of racism as an ACE, a perspective that resonates with some of the critiques of the traditional ACE framework as overly reflecting a dominantly white perspective that is inattentive to the stresses experienced by people of color.<sup>55</sup> They propose recognizing “intersectional cohorts” whose members often suffer disabilities.<sup>56</sup> If there is a likelihood that a cohort will suffer complex trauma and disability, they argue, that should be enough to create and certify a class (versus the *Compton* claim not of likelihood but of certainty).<sup>57</sup> Cooper and McGinley argue that “[w]here structures of inner-city poverty and violence combine with racial discrimination, disability law ought to remedy those barriers, when they culminate in dis/abilities, as well. We thus argue the federal disability statutes *must* be interpreted to recognize that complex trauma affects cohorts as well as individuals.”<sup>58</sup> Class-based claims would have the potential for broad structural remedies or at the least to providing support for resilience.

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53. *Id.* at 324–31.

54. *Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html> [<https://perma.cc/5PSD-L34S>] (last visited Jan. 1, 2020).

55. See, e.g., Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. PREVENTATIVE MED. 354, 355 (2015); David Finkelhor et al., *Improving the Adverse Childhood Experiences Study Scale*, 167 J. AM. MED. ASSOC. PEDIATRICS 70 (2013); Roy Wade, Jr. et al., *Adverse Childhood Experiences of Low-Income Urban Youth*, 134 PEDIATRICS 13, 14 (2014), <http://pediatrics.aappublications.org/content/pediatrics/early/2014/06/10/peds.2013-2475.full.pdf> [<https://perma.cc/U47G-V5FY>]. On the issue of whether ACEs can be used for structural change, see Nadine Burke Harris et al., *Prevent, Screen, Heal: Collective Action to Fight the Toxic Effects of Early Life Adversity*, 17 ACAD. PEDIATRICS S14 (2017).

56. McGinley & Cooper, *supra* note 3, at 303–04.

57. *Id.* at 304.

58. *Id.* at 337 (emphasis in original).

The shortcoming in this novel strategy, in my view, is that it continues to permit the structural damage to occur, *unless* this new conception of the meaning and scope of disability triggers a remedy that becomes so costly *after* the fact that it encourages proactive structural change. I also remain concerned about how a disability frame reinforces racial stereotypes. But their challenging way of thinking about “disability” and attentiveness to the impact and effects of racism is intriguing and eye-opening. Part of my argument about developmental equality is that structural and cultural barriers and challenge complicate and make more difficult, even undermine, the process of development for children at the bottom of the hierarchy, and racism is a factor both in the functioning of structures and the messages of the dominant culture.<sup>59</sup> The social science evidence and studies suggest in addition that resistance and resilience are also present in conjunction with stress, so the picture is complex, by no means simple.<sup>60</sup> Finally, I continue to assess, and McGinley and Cooper also express this view, whether the disability scaffold is limited and weak.<sup>61</sup> Nevertheless, as an available tool, essential pragmatism suggests it as a possible way now to reach some of the inequalities and hierarchies set out in *Reimagining Equality*. It is this call to the pragmatic and the possible that is at the heart of Professor Huntington’s Essay.

#### IV. ENGAGING IN CONCRETE PRAGMATIC LEGISLATIVE STEPS: LEARNING FROM THE EXAMPLE OF BROAD SUPPORT FOR PREKINDERGARTEN

Professor Huntington focuses on the legislative side, on pragmatic argument and political feasibility, using the example of universal prekindergarten as a first step.<sup>62</sup> Leading off with the litany of cutbacks under the Trump administration in Medicaid, SNAP, and other programs for low-income families, her account of where we stand is sobering.<sup>63</sup> Clearly, she dismisses the New Deal for Children as impossible under current political conditions. She finds one bright spot, however, in support for universal prekindergarten and explores

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59. DOWD, *supra* note 1, at 53–94. This is not to say that she has not explored her own broad strategy of better support for children. *See generally* CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW THE LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

60. DOWD, *supra* note 9–50.

61. *Id.* at 97–114. Woodhouse argues in her Essay, to the contrary, that the disability cases also demonstrate that interpretation of the statute has strengthened its usefulness. Woodhouse, *supra* note 1, at 366 n.71.

62. Huntington, *supra* note 4.

63. *Id.* at 343–44.

what we must learn from the movement's success.<sup>64</sup> Huntington derives four lessons from the prekindergarten movement:

1. Don't get too excited. While the prekindergarten movement is welcome, it is not part of a broader strategy and itself is limited.<sup>65</sup>
2. Research was critical to the success of this movement, to justify and substantiate the importance of prekindergarten. Large foundations were essential, by providing funding for advocacy, research, and communications.<sup>66</sup>
3. State-level politics and policy-making are very important to broad success.<sup>67</sup>
4. Coalition building is a necessity to succeed. The prekindergarten movement was supported by the general public, parents, and business.<sup>68</sup>

Huntington then adds additional insights in her final paragraph: universalism is far more popular than targeted programs; and, helping kids is favored, while helping parents is not.

This is a valuable and necessary reality check. Her point about state-level policies reinforces Woodhouse's point concerning the importance of the local for the implementation of the universal and national.<sup>69</sup> In addition, this evaluation of the prekindergarten movement provides concrete information about what is politically feasible, and the nature of the support needed to change the paradigm.

And yet, it is her first point that I believe is most critical: don't get too excited because the prekindergarten movement is not part of a comprehensive plan to better support all children. The danger in an incremental approach, especially one that is not tied to what is really needed for children, is that it accomplishes little, while dissipating support for a different understanding. I would still argue that a big picture or set of principles is essential to keeping the grand vision in view, toward better critique and ongoing construction to that end. It is critical so that even if prekindergarten is the only step taken, it is understood what it can and cannot do, standing alone. So, for example, if prekindergarten starts at age four, it must take account of all of the developmental inequities that may occur up to that point, and provide for the needs of all children to sustain their equality going forward

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64. *Id.* at 343.

65. *Id.* at 345.

66. *Id.* at 346.

67. *Id.* at 347.

68. *Id.* at 347–48.

69. Woodhouse, *supra* note 1, at 356–57.

rather than reinforce inequality. Similarly, if prekindergarten is preparation for elementary school, then if no changes are made in elementary and secondary schools, children are being educated to enter a system that does not educate them equally. Potentially any equality gains may be lost.<sup>70</sup>

Prekindergarten may provide an opportunity rather than a lesson in the limits of the present. It is critical to elevate a different vision into the macrosystem. Otherwise, our penchant for easy solutions may lead us to think we have “solved” the issue of children’s inequalities by taking this important step in early childhood, without seeing how it does not move us forward sufficiently on its own.<sup>71</sup> I would argue that we need to articulate and argue for that broader vision. Like the Green New Deal,<sup>72</sup> and Medicare for All,<sup>73</sup> we have to change the way we think and see existing systems, and what we believe we owe to all children. The New Deal for Children needs to become part of our macrosystem of ideas. We should be debating how to make it happen and when, not dismissing it out of hand as beyond us. Professor Huntington’s Essay implicitly pushes us to answer the question: and just *how* we are going to do that? I believe that we can, and must, engage in strategizing to put the vision out there.

### CONCLUSION

The current realities of too many children’s lives are far from the ideal of supporting children developmentally from birth, even pre-birth, to adulthood. The two foremost overarching factors that affect their life chances and place them at the bottom of hierarchies among

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70. Studies on Head Start suggest the gains are reversed or lost in the short-term, but some long-term gains exist. See Eliana Garces et al., *Longer-Term Effects of Head Start*, 92 AM. ECON. REV. 999, 999–1000 (2002). One wonders if the short-term lack of persistence of gains is linked to the inequalities in elementary and secondary education. The most recent study on long term gains challenges the positive findings of previous studies. Matt Barnum, *A New Study Questions Whether Head Start Still Produces Long-Run Gains Seen in Past Research*, CHALKBEAT (Aug. 8, 2019), <https://www.chalkbeat.org/posts/us/2019/08/08/head-start-early-childhood-education-long-term-effects-research/> [https://perma.cc/CN5D-ZYJL]. The most enduring evidence of lifelong gains from early childhood education is the Perry Preschool project. *Perry Preschool Project*, HIGH SCOPE, <https://highscope.org/perry-preschool-project/> [https://perma.cc/7EZ7-7LDF] (last visited Feb. 1, 2020).

71. Compare to parental leave, see *supra* note 25. The Family and Medical Leave Act, enacted in 1993, has not seen significant expansion in 25 years. Instead of being a beginning step on parental leave, or work-family policies more broadly, it has been an only step, and a very limited one at that.

72. Green New Deal, H.R. 109, 116th Cong. (2019).

73. Medicare for All, S. 1129, 116th Cong. (2019) (as introduced by Sen. Sanders).

children, are poverty and racism. Poverty creates a trajectory that leads to inequality. Racism dictates the likelihood that children of color will be poor, and that irrespective of economic status, their developmental roadway will be littered with barriers and challenges. Those children of color who succeed do so in spite of systems stacked against them.

The strategies and theoretical frameworks suggested by these authors, further elaborating and adding to the New Deal for Children, embrace a different vision for all children: children's equality. If we are to be true to our values, this is not radical change, it is instead essential and fundamental to those values.